



BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended;

AND IN THE MATTER OF the complaint by Ellen Anderson dated December 6, 1994 and the complaint by Lucia M. O'Neill dated September 14, 1995, alleging discrimination in the provision of services on the basis of sex.

B E T W E E N:

Ontario Human Rights Commission

Commission

- and -

Ellen Anderson and Lucia O'Neill

Complainants

- and -

The YMCA of Barrie

Respondent

DECISION ON IMPLEMENTATION

Adjudicator: Heather M. MacNaughton

Date: July 10, 2001

Board File Nos: BI-0264/99 and BI-0265/99

Decision No: 01- 013-IM

Board of Inquiry (*Human Rights Code*)
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APPEARANCES

Ontario Human Rights Commission)))	Naomi Overend, Counsel
Ellen Anderson <i>Complainant</i>)))	On her own behalf
Lucia O'Neill <i>Complainant</i>))))	On her own behalf
The YMCA of Barrie <i>Respondent</i>))	John Anderson, Counsel

THE HISTORY OF THIS COMPLAINT

On December 6, 2000, I released my decision in this matter (the “December Decision”). I found, based on facts agreed to by the parties, that the facilities as they existed at the Barrie YMCA constituted an infringement of the rights of Ellen Anderson and Lucia O’Neill under section 1 of the Ontario *Human Rights Code* R.S.O. 1990, c. H. 19 as amended (the “Code”).

I ordered the Barrie YMCA to build a Women’s Plus facility, comparable in size and amenities to the Men’s Plus. The December Decision set out a schedule during which the various stages of construction were to occur, with construction to be completed by September 1, 2001. I determined that the Board of Inquiry would remain seized, with respect to issues arising, until the completion of the construction.

On February 15, 2001, the hearing reconvened by conference call to deal with two issues of concern to the Complainants and the Ontario Human Rights Commission (the “Commission”). The conference call resulted in my decision of April 6, 2001 (the “April Decision”). Following the April Decision, the major points of controversy between the parties were:

1. whether the settlement that led to the December Decision was premised on the Barrie YMCA renovating the Men’s Plus facility at the same time as they constructed a new Women’s Plus facility, and
2. the size comparability of the proposed Women’s Plus facility and the existing, or renovated, Men’s Plus facility.

A further date was set to allow counsel for the Commission the opportunity to cross-examine a representative of Salter Farrow Pilon the architects who had prepared the construction drawings for the Barrie YMCA, and for the parties to make further submissions.

THE MATTERS NOT IN DISPUTE

The hearing resumed on June 22, 2001 by way of conference call. At the outset, I was advised that the parties had been able to resolve, to a large extent, their outstanding issues and had agreed to a process and revised schedule for completing the construction of the Women’s

Plus facility. The parties requested that I incorporate their resolution of these issues into a supplementary order.

Having heard the parties submissions, and in light of the fact that the time frames set out in the December Decision are now quite unattainable, I am prepared to grant a supplementary order as follows:

1. The Barrie YMCA will build a Women's Plus facility in accordance with the plans filed with the Board and attached to this decision. Any changes to the dimensions of this facility will be done only after agreement with the other parties, or failing that, further order of the Board. Likewise, any changes to the layout of the facility, other than minor changes, will only be made with the approval of the parties, or by further order of the Board. To avoid delays, the parties will be given two days to provide their agreement to a proposed change, failing which the matter will be forwarded to the Board for decision.
2. The timetable for the completion of the Women's Plus facility will be as follows: the Barrie YMCA and its consultants will have completed the tender process and selected the contractors by October 1, 2001, and construction will be completed by April 1, 2002.
3. The Barrie YMCA will renovate its Men's Plus facility to ensure comparability with the Women's Plus facility. Specifically, the Barrie YMCA will make the following changes to the Men's Plus facility:
 - new carpeting
 - walls and trim painted
 - new and /or repainted lockers
 - new sinks, fixtures and counters
 - new whirlpool
 - new fitness equipment
 - upgrading one of the current water closets to a barrier-free water closet, if architectural investigations reveal that this is feasible.
4. The finishes, the whirlpool, and the quality of the fitness equipment outlined in the above paragraph will be comparable, if not the same as, that used/placed in the Women's Plus facility. However such things as the colour of finishes or the type of fitness equipment may vary according to membership preference.

5. The changes to the Men's Plus facility will be completed by April 1, 2002.
6. The Barrie YMCA will report monthly to the Board of Inquiry, and the parties, with respect to compliance with this order.

THE MATTERS STILL IN DISPUTE

The Commission and the Complainants seek orders from the Board with respect to two further matters, posting and enforcement. First, they seek an order that this Decision, and the December Decision, be posted on the membership bulletin board, immediately upon its release and until such time as the Women's Plus facility is completed.

Second, the Commission and the Complainants seek an order that if the Women's Plus facility is not completed by September 2, 2001, or alternatively by April 1, 2002, the Barrie YMCA will convert the Men's Plus facility to a Women's Plus facility, to be available for the exclusive use of women members until such time as the Women's Plus facility is completed. Both of these requests are opposed by the Barrie YMCA.

POSTING OF THE DECISIONS

The Commission and the Complainants seek this order to ensure that the members of the Barrie YMCA are aware of their continued involvement in this matter and to provide and explanation to the members for the delay in construction. The Barrie YMCA agrees that a communication should be posted regarding the new timetable for the construction of the Women's Plus facility, but does not believe that the December Decision and the Supplementary Decision should be posted. Alternatively, they submit that all of the Board's Decisions in respect of this matter should be posted.

Having heard these submissions, I am of the view that to be consistent with the spirit of the December Decision, and to ensure that the members of the Barrie YMCA are aware of the continued involvement of the Complainants, the Commission and the Board in the construction,

it is appropriate for all decisions and orders of the Board to be posted on the membership bulletin board until such time as the Women's Plus facility is completed. I order them to do so.

This order does not prevent the Barrie YMCA from communicating with its members about the progress of the construction as it sees fit.

ENFORCEMENT

The Commission and the Complainants submit that, for the Board's decision to be effective, it should have a built-in enforcement mechanism. They submit that only with such an enforcement provision can they be sure that the Barrie YMCA will meet its commitments to the construction schedule, failing which the Commission and the Complainants will have an alternative acceptable remedy which will meet the requirements of the *Code*.

The Commission and the Complainants are concerned that the most recent correspondence from Salter Farrow Pilon, the architects for the project, sets out a number of possible problems which might affect the construction schedule. If construction delays occur and the scheduled completion date is not met, the Commission and the Complainants submit that the discriminatory facilities will have existed for well in excess of 24 years. This correspondence, they submit, continues a pattern in which the Barrie YMCA fails to live up to its commitments with respect to the construction.

In support of their submission, the Commission and the Complainants rely on the fact that the December Decision contemplated a September 1, 2001 completion date for the Women's Plus facility. Because of delays which, they submit, are solely the responsibility of the Barrie YMCA, that date cannot be met and a facility that was then discriminatory, still continues to be.

They submit that their concerns about the good faith of the Barrie YMCA and the delays in the construction are not spurious. Rather, they submit that a review of the correspondence exchanged by the parties between January 2000 and November 2000, leading up to the

settlement and to the December Decision, will demonstrate why they are so concerned. The Commission and the Complainants seek to file some of that correspondence with me to persuade me that the enforcement mechanism they now seek is appropriate.

The Commission and the Complainants submit that without some enforcement mechanism, they and the Board will be required, on an ongoing basis, to evaluate the good faith of the Barrie YMCA and whether or not delays are avoidable. They submit that, in commercial contracts, penalty clauses are commonly used to ensure compliance with deadlines and while they acknowledge that penalty clauses are not appropriate in a human rights context, they argue that without some repercussion if delays occur the effectiveness of their remedy is delayed.

The Commission and the Complainants propose that an appropriate enforcement provision would be to require that, on either September 1, 2001 or April 1, 2002, the existing men's plus facility be converted to a women's plus facility to ensure equity from that point forward. This conversion, they submit, would be easy to enforce and would prevent the Commission and the Complainants from being required to monitor the ongoing construction for delay and bringing it back to the Board ongoingly.

The Barrie YMCA opposes the suggestion of an enforcement mechanism. They submit that it is not appropriate for the Commission and the Complainants to try and persuade me that the Barrie YMCA is at fault, or acted in bad faith, leading to delay in compliance with the December Decision. They submit that the parties reached an agreement which was incorporated into the December Decision and it contemplated that the parties could bring matters of concern back before the Board. The Barrie YMCA submits that if the parties choose to exercise that remedy, and resultant delay occurs, neither party should be criticized or penalized for that.

They further submit that the enforcement mechanism now sought would amount to 'reinventing' or renegotiating the original agreement, and would have repercussions to the Barrie YMCA's goodwill and potentially to its contracts with all of its male members. Such an order, they submit, is not remedial but punitive.

The Barrie YMCA also submits that the issues set out by Millet Salter, which may affect the construction schedule, have been factored into the dates to which they have committed themselves and they believe that the schedule is a reasonable one. However, they note that unanticipated construction delays, outside their control, cannot be anticipated and might result in delay. The Barrie YMCA should not, it submits, be penalized for matters outside its control.

The Barrie YMCA submits that the monthly construction reports, which are required as a part of this Decision, will ensure that the parties can make submissions about delay issues when they arise. Further, if the Women's Plus Facility is not completed by April 2001 then the Board, on its own initiative, or at the parties' request, could make an order in that regard.

The Barrie YMCA opposes the filing with me correspondence between the parties leading up to the December Decision. They submit that the correspondence reflects the discussions and efforts of these parties to resolve matters without the need for a decision. The positions taken by parties leading up to a settlement should not be put in evidence. Alternatively, the Barrie YMCA suggests that a partial and selective part of the correspondence, without the complete context, could be misleading and would be most unfair.

DECISION

I am not inclined to review the correspondence exchanged, or to hear evidence from the parties or their counsel as to what might, or might not have been said, meant or understood in the negotiations leading up to the December Decision. This Board has consistently encouraged efforts at settlement and exposing those efforts to scrutiny may well reduce their effectiveness and the ability of the parties to achieve a resolution. Further, if I were inclined to review the history of the conduct of the parties, I would need to review all of the correspondence, and to hear evidence in that regard.

In my view, that inquiry would not be of assistance to me in determining the appropriateness of an enforcement mechanism in this case. It is sufficient that the Barrie YMCA

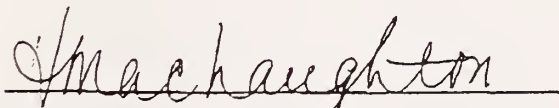
will not complete the Women's Plus facility by September 1, 2001 in accordance with the December Decision.

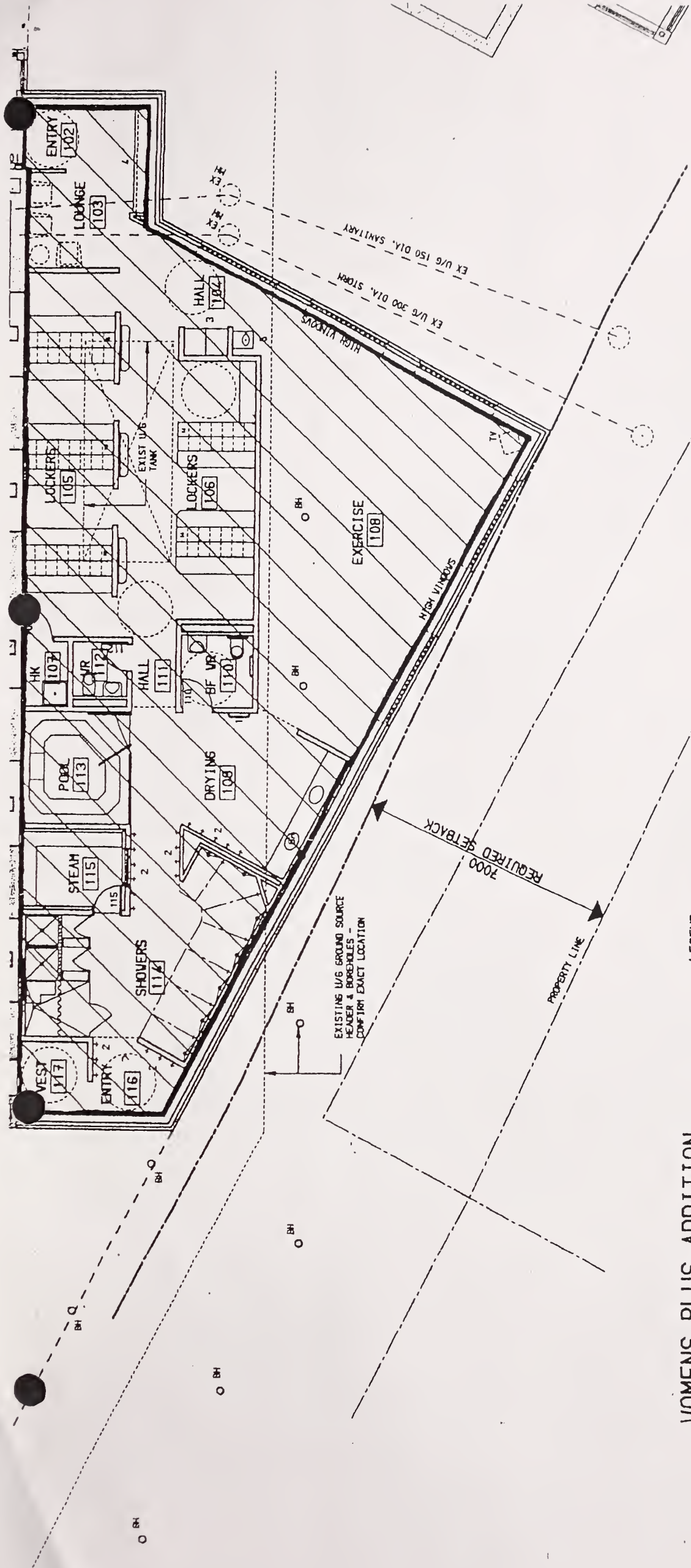
The suggestion by the Commission and the Complainant of an enforcement mechanism is very attractive and the mechanism they propose has a great deal to commend it. Despite my finding in the December Decision that the facilities at the Barrie YMCA infringed the human rights of the Complainants, very little progress has been made in respect of this facility in almost seven months. If the facility is completed in April 2002, that will be some 17 months after my original finding. Further, there is a possibility that even that date will not be met. This delay is unacceptable. The proposed enforcement mechanism would ensure that women members had access to a Membership Plus facility in accordance with the intent of the December Decision.

That being said, an enforcement mechanism was not a part of the original agreement negotiated between these parties. The remedy then contemplated, and incorporated into the December Decision, was that applications would be made to the Board with respect to outstanding issues as and when they arose. Further, the enforcement mechanism has the potential to be punitive in that it would be effective regardless of whether delays in construction are within the control of the Barrie YMCA.

As a result, I am not prepared to order it at this time. However, if during the course of reviewing the monthly reports that are filed with the Board it becomes apparent that the project is going to be delayed as a result of actions either taken or not taken by the Barrie YMCA, then I will consider an application by the Commission or the Complainants for an enforcement mechanism like that currently proposed.

Dated at Vancouver, this 10th day of July, 2001


Heather M. MacNaughton



WOMENS PLUS ADDITION
BARRIE YMCA

SCALE 1:125

LEGEND:

- 1. BATHING SUIT DRYER
- 2. TOWEL HANGING SPACE
- 3. CLEAN & SOILED TOWELS
- 4. COATS
- 5. DRINKING FOUNTAIN

NET FLOOR AREA 226.1 M²

